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Ho Chung Meng v ASP Che Intan bt Subri & Ors

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HIGH COURT (ALOR SETAR) — CRIMINAL APPLICATION NO KA-44–15–07 OF 2023
EVAWANI FARISYTA JC
23 AUGUST 2023

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Criminal Procedure — Habeas corpus — Application for — Applicant arrested and detained under Security Offence (Special Measures) Act 2012 ('SOSMA') — Applicant subsequently charged under Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 — Whether there was failure to notify next-of-kin — Whether there was failure to give counsel access to applicant — Whether letter denying the right to consult counsel was made without proper authorization — Whether prerequisite to application of SOSMA was not satisfied — Whether detention was vague and ambiguous — Whether there was failure to give reasons for arrest — Whether detention invalid — Whether court could issue writ of habeas corpus when applicant no longer under preventive detention and had been charged in court and being detained under remand order — Anti-Trafficking In Persons And Anti-Smuggling of Migrants Act 2007 s 26D — Criminal Procedure Code s 28A — Federal Constitution art 5(3) — Security Offence (Special Measures) Act 2012 ss 4(2), (5), 5(1)(a), (b), (2) & 13

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The applicant applied for a writ of habeas corpus to be issued ('the applicant's application') against his detention by the police under s 4(5) of the Security Offences (Special Measures) Act 2012 (Act 747) ('the SOSMA') and the Anti-Trafficking on Persons and Anti-Smuggling of Migrants Act 2007 (Act 670) ('the ATIPSOM'). However, a day before the hearing date of the applicant's application, the applicant had been charged under s 26D of the ATIPSOM in the sessions court and the applicant was denied bail by the sessions court pursuant to s 13 of the SOSMA. Hence, the applicant's detention under s 4(5) of the SOSMA had expired upon him being charged in court. The respondents submitted that even if the applicant's detention was found to be unlawful, the court could not issue a writ of habeas corpus as the applicant was no longer being detained under a preventive order but instead was being remanded under an order of the court. To seek a release from such detention, the applicant should apply to be released on bail pursuant to the provision of s 13 of the SOSMA. The applicant raised the following issues: (a) failure of the respondents to notify the next-of-kin pursuant to s 5(1)(a) of the SOSMA; (b) failure to give counsel access to the applicant even after 48 hours had lapsed as prescribed under s 5(1)(b) of the SOSMA and such delay resulted in the detention being invalid and unlawful; (c) the letter denying the right to consult counsel under s 5(1)(b) of the SOSMA ('the letter') was signed by one

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DSP Syamsul bin Sinring and not a Superintendent of Police, and thus had no authority to do the same; (d) the prerequisite to the application of SOSMA was not satisfied by the respondents to warrant the applicant to be detained under SOSMA, ie, acting in concert with '... substantial body or person' as in its Preamble; (e) the applicant's detention was vague and ambiguous, ie, whether the applicant was first detained for 24 hours, then only detained for further 28 days, or straight 28 days detention under Superintendent of Police's order; and (f) failure to give reasons for the arrest pursuant to s 4(2) of the SOSMA — in relation to this issue, the applicant submitted that SOSMA provided specific provisions (ie, s 4(2) of the SOSMA) on this matter, consequently, it superseded any other provision relating to the same, hence, s 28A of the Criminal Procedure Code ('the CPC') could not be used on an arrest under SOSMA. In addition to the above issues, the court had also discussed the issue of whether the court could issue a writ of habeas corpus when the applicant was no longer under preventive detention and had been charged in court and being detained under a remand order of the court — with respect to this issue, the applicant submitted that: (i) based on the decision in the case of *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* [2022] 3 MLJ 203 ('*Lei Meng*'s case'), the changing of restraining authority did not prevent the court to preside and decide on the applicant's application for a writ of habeas corpus to be issued; and (ii) the detention order under SOSMA as at the date of the filing of the application and the subsequent remand order of the court should be viewed as a single overarching transaction as laid down in the case of *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759 ('*Zaidi Kanapiah*'s case').

Held, dismissing the application:

(1) Looking at the scheme of SOSMA, the safeguards laid down by the legislature were intended to protect the rights of the detainee upon any unlawful arrest and detention. If it was accepted that the right to notify the next-of-kin did not amount to mandatory procedural requirements, then it would defeat the purpose of the safeguards as per intended by the Legislature. The effect would also lead to arbitrary arrest or detention as the detaining authority would not be bothered to inform any family members of such arrest or detention and no family members would be aware of such detention. The court opined that this was not the intention of the legislature when SOSMA was enacted. Therefore, the failure to notify the applicant's next-of-kin under s 5(1)(a) of the SOSMA amounted to non-compliance with procedural requirements under SOSMA (see paras 29–30).

(2) The first authorization for the delay of access to counsel was authorized by ACP Ahmad Shukri bin Mat Akhir, a police officer not below the rank of Superintendent of Police as required by s 5(2) of the SSOSMA upon his satisfaction of the reasons as stipulated under such provision, and such

delay was then informed to the applicant where the applicant acknowledged his understanding. Therefore, the authorization was executed according to s 5(2) of the SOSMA, and such delay expired on 24 June 2023. SOSMA only allowed a single delay of the right to consult counsel, and that right began from the day of the arrest. Once the 48 hours had lapsed, there could be no further delay. The court found that the second delay of the right to consult counsel was done without proper authorization and after the expiry of the 48 hours allowed by the law and therefore, had breached s 5(1)(b) and 5(2) of the SOSMA. The requirement to allow the applicant to consult counsel under s 5(1)(b) of the SOSMA was specifically provided under the law and the failure to provide such right tantamount to a breach of a mandatory procedural requirement under SOSMA. Therefore, the failure of the respondents to allow the applicant access to his counsel rendered the detention to be unlawful (see paras 37–39, 45–46, 52 & 54).

(3) The detention or extended detention under SOSMA was specifically catered for the purpose of completing the investigation. At the investigation stage, what needed to be done by the investigating party was to obtain evidence to fulfill the elements of the charge. This was why the court agreed with the respondents that this was not the proper forum to determine the elements of the charge. What was being done by the detaining authority was to seek evidence for the purpose of prosecution or release of the detainee. Whether the applicant was connected to or having in concert with a substantial group of persons was something that had to be determined by the court upon an institution of prosecution. Therefore, the arguments put forth by the applicant on this issue were devoid of merit (see paras 62–63 & 65).

(4) The actual date of arrest of a detainee was of utmost importance because it determined the computation of the extended detention as stipulated in s 4(5) of the SOSMA. Looking at the circumstances leading to the arrest of the applicant, the court agreed with the applicant's argument that there was ambiguity over the actual date of the applicant's arrest and such ambiguity should be resolved in favour of the applicant. This was pivotal as it related to the powers of the police to extend the detention for not more than 28 days. Any extension of detention of more than 28 days shall render the detention unlawful (see paras 69, 71 & 73).

(5) Both the provisions of s 4(2) of the SOSMA and s 28A(1) of the CPC were similar. It required that the person arrested be informed as soon as may be of the grounds of his arrest by the police officer making the arrest. The court agreed with the applicant's argument that when there was a specific provision under a specific law, that provision superseded any other provision relating to the same. The maxim generalia specialibus derogant would be applicable when there was a conflict between a specific

law and a general law. However, the two provisions being contended in this application spoke of the same effect which was: to be informed as soon as may be of the grounds of arrest. This, in the opinion of the court, did not show any conflict. The effect of both provisions was the same which was the arrested person shall be informed of his arrest as soon as may be, as enshrined by art 5(3) of the Federal Constitution. Based on this finding, the court found that there was no merit on this issue as contended by the applicant (see paras 77–78 & 81).

(6) Based on the authority of *Lei Meng*'s case, the court opined that although at the time of the hearing of the applicant's application, the applicant had been charged in court for an offence under ATIPSOM, however as the application was filed prior to the prosecution in the respective court, the application had not become academic and remained a live issue which this court was within its jurisdiction to hear and decide upon (see paras 106 & 108).

(7) Upon careful consideration of the facts and decisions by the Federal Courts in both *Zaidi bin Kanapiah*'s case and *Lei Meng*'s case, the court opined that the facts in the applicant's application were to be distinguished. The court further agreed with the High Court's decision in the case of *Tanasilan a/l Nakethiran v Public Prosecutor & Ors* [2023] 7 MLJ 632. The 'single overarching transaction' as emphasized by the Federal Courts referred to preventive detention either by the same legislation or different legislation or even under different detaining authorities. In the present application, although the initial detention was preventive detention, however, the subsequent detention was no longer preventive detention as it was a detention pursuant to an order of a court of competent jurisdiction imposed upon a prosecution being instituted against the applicant. This situation could not attract the 'single overarching transaction' as per submitted by the applicant (see paras 115 & 117–118).

[Bahasa Malaysia summary

Pemohon memohon agar writ habeas corpus dikeluarkan ('permohonan pemohon') terhadap penahanannya oleh polis di bawah s 4(5) Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 (Akta 747) ('AKKLK') dan Akta Antipemerdagangan Orang dan Antipenyeludupan Migran 2007 (Akta 670) ('AAOAM'). Bagaimanapun, sehari sebelum tarikh pendengaran permohonan pemohon, pemohon telah didakwa di bawah s 26D AAOAM di mahkamah sesyen dan pemohon telah dinafikan ikat jamin oleh mahkamah sesyen menurut s 13 AKKLK. Oleh itu, penahanan pemohon di bawah s 4(5) AKKLK telah tamat apabila dia didakwa di mahkamah. Responden-responden berhujah bahawa jikapun penahanan pemohon didapati tidak sah, mahkamah tidak boleh mengeluarkan writ habeas corpus kerana pemohon tidak lagi ditahan di bawah perintah pencegahan sebaliknya ditahan reman di bawah

perintah mahkamah. Untuk mendapatkan pembebasan daripada penahanan tersebut, pemohon hendaklah memohon untuk dibebaskan dengan ikat jamin menurut peruntukan s 13 AKKLK. Pemohon membangkitkan isu-isu berikut: (a) kegagalan responden-responden untuk memberitahu waris kadim selaras dengan s 5(1)(a) AKKLK; (b) kegagalan untuk memberi akses peguam kepada pemohon walaupun selepas 48 jam telah luput seperti yang ditetapkan di bawah s 5(1)(b) AKKLK dan kelewatan tersebut menyebabkan penahanan tersebut tidak sah dan menyalahi undang-undang; (c) surat menafikan hak untuk berunding dengan peguam di bawah s 5(1)(b) AKKLK ('surat tersebut') telah ditandatangani oleh seorang DSP Syamsul bin Sinring dan bukan seorang Penguasa Polis, dan oleh itu tidak mempunyai kuasa untuk berbuat demikian; (d) prasyarat untuk penggunaan AKKLK tidak dipenuhi oleh responden-responden untuk mewajarkan pemohon ditahan di bawah AKKLK, iaitu, bertindak bersama '... sekumpulan besar orang' seperti dalam Mukadimahnya; (e) penahanan pemohon adalah kabur dan samar-samar, iaitu, sama ada pemohon pada mulanya ditahan selama 24 jam, dan hanya kemudiannya ditahan selama 28 hari lagi, atau terus ditahan selama 28 hari di bawah arahan Penguasa Polis; dan (f) kegagalan untuk memberikan sebab penahanan menurut s 4(2) AKKLK — berhubung isu ini, pemohon berhujah bahawa AKKLK menyediakan peruntukan khusus (iaitu, s 4(2) AKKLK) mengenai perkara ini, akibatnya, ia menggantikan mana-mana peruntukan lain yang berkaitan dengan perkara yang sama, oleh itu, s 28A Kanun Tatacara Jenayah ('KTJ') tidak boleh digunakan untuk tangkapan di bawah AKKLK. Selain isu-isu di atas, mahkamah juga telah membincangkan isu sama ada mahkamah boleh mengeluarkan writ habeas corpus apabila pemohon tidak lagi berada di bawah tahanan pencegahan dan telah didakwa di mahkamah dan ditahan di bawah perintah reman mahkamah — berkenaan dengan isu ini, pemohon berhujah bahawa: (i) berdasarkan keputusan dalam kes *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* [2022] 3 MLJ 203 ('kes *Lei Meng*'), pertukaran kuasa penahanan tidak menghalang mahkamah untuk mempengerusikan dan memutuskan permohonan pemohon untuk pengeluaran writ habeas corpus; dan (ii) perintah penahanan di bawah AKKLK pada tarikh pemfailan permohonan dan perintah reman mahkamah yang berikutnya hendaklah dilihat sebagai satu transaksi tunggal menyeluruh seperti yang dinyatakan dalam kes *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759 ('kes *Zaidi bin Kanapiah*').

Diputuskan, menolak permohonan:

(1) Melihat kepada skim AKKLK, perlindungan yang ditetapkan oleh badan perundangan bertujuan untuk melindungi hak-hak tahanan apabila berlaku apa-apa penangkapan dan penahanan yang menyalahi undang-undang. Sekiranya diterima bahawa hak untuk memberitahu waris kadim tidak berjumlah kepada keperluan prosedur mandatori, maka ia akan menafikan tujuan perlindungan seperti yang dimaksudkan

oleh badan perundangan. Kesannya juga akan membawa kepada penangkapan atau penahanan secara sewenang-wenangnya kerana pihak berkuasa yang menahan tidak akan peduli untuk memaklumkan mana-mana ahli keluarga tentang penangkapan atau penahanan tersebut dan tiada ahli keluarga akan mengetahui tentang penahanan tersebut. Mahkamah berpendapat bahawa ini bukan tujuan badan perundangan semasa AKKLK digubal. Oleh itu, kegagalan untuk memberitahu waris kadim pemohon di bawah s 5(1)(a) AKKLK adalah berjumlah kepada ketidakpatuhan keperluan prosedur di bawah AKKLK (lihat perenggan 29 & 30).

(2) Kebenaran pertama untuk kelewatan akses kepada peguam telah dibenarkan oleh ACP Ahmad Shukri bin Mat Akhir, seorang pegawai polis yang berpangkat tidak rendah daripada Penguasa Polis seperti yang dikehendaki oleh s 5(2) AKKLK setelah beliau berpuas hati dengan alasan seperti ditetapkan di bawah peruntukan tersebut, dan kelewatan tersebut kemudiannya dimaklumkan kepada pemohon di mana pemohon mengakui pemahamannya. Oleh itu, kebenaran tersebut telah dilaksanakan mengikut s 5(2) AKKLK, dan kelewatan tersebut telah tamat pada 24 Jun 2023. AKKLK hanya membenarkan satu kelewatan bagi pemberian hak untuk berunding dengan peguam, dan hak tersebut bermula dari hari penahanan. Apabila 48 jam telah berlalu, tidak ada kelewatan lagi. Mahkamah mendapati bahawa kelewatan kedua pemberian hak untuk berunding dengan peguam dilakukan tanpa kebenaran yang sewajarnya dan selepas tamat tempoh 48 jam yang dibenarkan oleh undang-undang dan oleh itu, telah melanggar s 5(1)(b) dan 5(2) AKKLK. Keperluan untuk membenarkan pemohon berunding dengan peguam di bawah s 5(1)(b) AKKLK diperuntukkan secara khusus di bawah undang-undang dan kegagalan untuk memberikan hak tersebut berjumlah kepada pelanggaran keperluan prosedur mandatori di bawah AKKLK. Oleh itu, kegagalan responden untuk membenarkan pemohon mendapatkan akses kepada peguamnya menyebabkan penahanan tersebut menyalahi undang-undang (lihat perenggan 37–39, 45–46, 52 & 54).

(3) Penahanan atau penahanan lanjutan di bawah AKKLK adalah khusus untuk tujuan melengkapkan siasatan. Di peringkat penyiasatan, apa yang perlu dilakukan oleh pihak penyiasat ialah mendapatkan bukti bagi memenuhi unsur pertuduhan. Itulah sebabnya mahkamah bersetuju dengan responden-responden bahawa ini bukan forum yang sesuai untuk menentukan elemen-elemen pertuduhan. Apa yang dilakukan oleh pihak berkuasa penahanan adalah untuk mendapatkan bukti bagi tujuan pendakwaan atau pembebasan tahanan. Sama ada pemohon mempunyai kaitan atau berganding bahu dengan sekumpulan besar orang adalah sesuatu yang perlu ditentukan oleh mahkamah apabila pendakwaan dimulakan. Oleh itu, hujah-hujah yang dikemukakan oleh

pemohon mengenai isu ini adalah tidak bermerit (lihat perenggan 62–63 & 65).

(4) Tarikh sebenar penangkapan seseorang tahanan adalah amat penting kerana ia menentukan pengiraan penahanan lanjutan seperti yang ditetapkan dalam s 4(5) AKKLK. Melihat kepada keadaan yang membawa kepada penahanan pemohon, mahkamah bersetuju dengan hujah pemohon bahawa terdapat kesamaran tarikh sebenar penangkapan pemohon dan kekaburan tersebut harus diselesaikan memihak kepada pemohon. Ini adalah penting kerana ia berkaitan dengan kuasa polis untuk melanjutkan penahanan tidak melebihi 28 hari. Apa-apa lanjutan penahanan lebih daripada 28 hari akan menjadikan penahanan tersebut menyalahi undang-undang (lihat perenggan 69, 71 & 73).

(5) Kedua-dua peruntukan s 4(2) AKKLK dan s 28A(1) KTJ adalah serupa. Ia memerlukan orang yang ditangkap dimaklumkan secepat mungkin tentang alasan penahanannya oleh pegawai polis yang membuat tangkapan. Mahkamah bersetuju dengan hujah pemohon bahawa apabila terdapat peruntukan khusus di bawah undang-undang tertentu, peruntukan tersebut menggantikan mana-mana peruntukan lain yang berkaitan dengannya. Maxim generalia specialibus derogant akan terpakai apabila terdapat percanggahan antara undang-undang khusus dan undang-undang am. Walau bagaimanapun, kedua-dua peruntukan yang dipertikaikan dalam permohonan ini bercakap tentang kesan yang sama iaitu: dimaklumkan secepat mungkin tentang alasan penahanan. Ini, pada pendapat mahkamah, tidak menunjukkan apa-apa percanggahan. Kesan kedua-dua peruntukan adalah sama iaitu orang yang ditangkap hendaklah dimaklumkan tentang penahanannya secepat mungkin, seperti yang termaktub dalam perkara 5(3) Perlembagaan Persekutuan. Berdasarkan dapatan ini, mahkamah mendapati tiada merit dalam isu ini seperti yang dipertikaikan oleh pemohon (lihat perenggan 77–78 & 81).

(6) Berdasarkan autoriti kes *Lei Meng*, mahkamah berpendapat bahawa walaupun pada masa pendengaran permohonan pemohon, pemohon telah didakwa di mahkamah atas kesalahan di bawah AAOAM, namun kerana permohonan tersebut difailkan sebelum pendakwaan di mahkamah yang berkaitan, permohonan tersebut tidak menjadi akademik dan kekal sebagai isu langsung yang berada dalam bidang kuasa mahkamah ini untuk didengar dan diputuskan (lihat perenggan 106 & 108).

(7) Setelah pertimbangan teliti ke atas fakta dan keputusan oleh Mahkamah Persekutuan dalam kedua-dua kes *Zaidi bin Kanapiah* dan *Lei Meng*, mahkamah berpendapat bahawa fakta dalam permohonan pemohon perlu dibezakan. Mahkamah seterusnya bersetuju dengan keputusan Mahkamah Tinggi dalam kes *Tanasilan a/l Nakethiran v Public Prosecutor*

& Ors [2023] 7 MLJ 632. 'Single overarching transaction' seperti yang ditekankan oleh Mahkamah Persekutuan merujuk kepada penahanan pencegahan sama ada melalui perundangan yang sama atau perundangan yang berbeza atau bahkan di bawah autoriti penahanan yang berbeza. Dalam permohonan ini, walaupun penahanan awal adalah penahanan pencegahan, namun, penahanan berikutnya bukan lagi penahanan pencegahan kerana ia adalah penahanan menurut perintah mahkamah yang mempunyai bidang kuasa berwibawa yang dikenakan apabila pendakwaan dimulakan terhadap pemohon. Keadaan ini tidak dapat menarik 'single overarching transaction' seperti yang dihujahkan oleh pemohon (lihat perenggan 115 & 117-118).]

Cases referred to

Abdullah bin Atan v PP and other appeals [2020] 6 MLJ 727, FC (refd)
Application by Tengku Ahmad Tajudin bin Tengku Ibrahim, Re [1984] 2 MLJ 231 (refd)
Gunasingam a/l Kolasegaram dan lain-lain lwn Timbalan Menteri Keselamatan Dalam Negeri Malaysia dan lain-lain [2006] 2 MLJ 363; [2005] 1 LNS 169, HC (refd)
Hashim bin Saud v Yahaya bin Hashim & Anor [1977] 2 MLJ 116; [1977] 1 LNS 32, FC (refd)
Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals [2022] 3 MLJ 203; [2022] 3 CLJ 177, FC (distd)
Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals [2002] 4 MLJ 449; [2002] 4 CLJ 309, FC (refd)
Mohammad Azanul Haqimi bin Tuan Ahmad Azahari v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 6 MLJ 220; [2019] 8 CLJ 465, FC (folld)
Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198; [1975] 1 LNS 117, FC (refd)
Poovaneswaran a/l Rave v PP [2022] MLJU 2996; [2022] 1 LNS 2766, HC (refd)
PP v Chew Siew Luan [1982] 2 MLJ 119, FC (refd)
PP v Poovaneswaran a/l Rave (Criminal Appeal No 05(HC)-207–11 of 2022(A)) (unreported), FC (refd)
Tanasilan a/l Nakethiran v PP & Ors [2023] 7 MLJ 632; [2022] 9 CLJ 462, HC (folld)
Tanasilan a/l Nakethiran v PP & Ors [2023] MLJU 995, HC (refd)
Tetuan Wan Shahrizal, Hari & Co v PP [2023] 4 MLJ 1, FC (refd)
Timbalan Menteri Dalam Negeri & Ors v Norazmi bin Ali [2020] MLJU 1679, HC (refd)
Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia & Ors [1975] 2 MLJ 279 (refd)
Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases [2021] 3 MLJ 759, FC (distd)

Legislation referred to

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ss 26A, 26D, 26J, Part IIIA
Criminal Procedure Code s 28A, 28A(1)
Dangerous Drugs Act (Special Measures) Act 1971
Federal Constitution art 5(3)
Prevention of Crime Act 1959 s 4(1), (2)
Security Offences (Special Measures) Act 2012 ss 4, 4(1), (4), (5), (9), 5(1), (1)(b), (2), 13, First Schedule

Ishak Mohd Yusof (with Lee Keng Fatt) (Fatt & Co) for the applicant.
Mohd Zain bin Ismail (with Nuur Izham bin Ismail) (Federal Counsel, Office of the Legal Advisor, Ministry of Home Affairs) for the respondents.

Evawani Farisyta JC:

INTRODUCTION

[1] The applicant applied for a writ of habeas corpus to be issued against his detention by the police under sub-s 4(5) of the Security Offences (Special Measures) Act 2012 (Act 747) ('the SOSMA') and the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670) ('the ATIPSOM').

[2] The application was filed by way of a notice of motion dated 1 July 2023 (encl 1) supported by the affidavit affirmed by the deponent who is the applicant's wife (encl 2) and also filed together with a certificate of urgency (encl 3). The application was first mentioned on 4 July 2023, and the application was fixed for hearing on 13 July 2023.

[3] On the hearing date of the application (13 July 2023), this court was informed that the applicant has been charged under s 26D of the ATIPSOM in the Sessions Court at Baling on 12 July 2023, which was a day before the hearing date before this Court, and the applicant was denied bail by the sessions court pursuant to s 13 of the SOSMA. Hence the applicant's detention under s 4(5) of the SOSMA has expired upon him being charged in court.

[4] The applicant however submitted that although the applicant is no longer detained under s 4(5) of the SOSMA, but instead remanded under an order of the court, the application cannot be rendered academic. Whereas the respondent submitted that upon the applicant being charged in court and remanded, this court no longer has the jurisdiction to issue a writ of habeas corpus, as the application has now become academic.

[5] This court then fix 20 July 2023 for the decision on the issue raised by both parties on whether the application has been rendered academic or not. However, on the date of the decision, the respondent submitted that they no longer pursue the matter but instead, what the respondent is objecting to at this juncture was that even if the applicant's detention is found to be unlawful, this court cannot issue a writ of habeas corpus as the applicant is no longer being detained under a preventive order but instead is being remanded under an order of the court. To seek a release from such detention, the applicant should apply to be released on bail pursuant to the provision of s 13 of the SOSMA.

[6] At the end of the submission on the objection by the respondents, this court decided that the decision on the matter raised by the respondents shall be decided upon the completion of the Hearing of the application on merits. Both parties then submitted on the merits of the application which went on for two days (20 July 2023 and 26 July 2023) and this court then fixed 31 July 2023 for the decision of the application.

[7] On 31 July 2023, this court decided that the application of the applicant as in encl 1 for a writ of habeas corpus to be issued against his detention be dismissed. Dissatisfied with the decision of this court, the applicant filed an appeal to the Federal Court.

FACTS OF THE CASE

[8] On 22 June 2023 at around 11 am, ASP Che Intan bt Subri arrested the applicant together with three other detainees (two males and one female) at Pejabat Cawangan D7, Bahagian Siasatan Jenayah, Ibu Pejabat Polis Daerah Kota Setar, Kedah. He was arrested pursuant to s 4 of the SOSMA for the alleged commission of an offence under s 26A of the ATIPSOM. The applicant was informed of the reason for his arrest and his rights as stipulated under s 28A of the Criminal Procedure Code ('the CPC').

[9] ASP Che Intan bt Subri then obtained from the applicant the contact number of the applicant's wife (Foo Li Yuan) and lawyer (Khoo Wan Ching). She attempted to contact the applicant's wife two times to inform her of the applicant's arrest and detention, however, her calls were unanswered. She then contacted Khoo Wan Ching and Khoo Wan Ching then arrived at Ibu Pejabat Polis Daerah Kota Setar, Kedah at about 4pm. ASP Che Intan bt Subri informed Khoo Wan Ching of the applicant's arrest under s 4 of the SOSMA and Khoo Wan Ching acknowledged the notice of the applicant's arrest as per exhibited in exh 'CI2' of encl 7.

[10] On the same day, ASP Che Intan bt Subri applied to ACP Ahmad Shukri bin Mat Akhir, after having been satisfied that the investigation against

the applicant cannot be completed within twenty-four hours, for the detention of the applicant to be extended for a period of not more than twenty-eight days pursuant to sub-s 4(5) of the SOSMA for the purpose of completing the investigation. ACP Ahmad Shukri bin Mat Akhir granted the extended detention order under sub-s 4(5) of the SOSMA as per exhibited in exh 'AS1' of his affidavit in reply (encl 6).

[11] ASP Che Intan bt Subri had also applied to ACP Ahmad Shukri bin Mat Akhir to authorize a delay of not more than 48 hours for the applicant's right of consultation with a legal counsel under sub-s 5(1)(b) of the SOSMA on the grounds stated in para 11 of her affidavit in reply (encl 7). Pursuant to the application, ACP Ahmad Shukri bin Mat Akhir authorised the delay as exhibited in exh 'AS2' of his affidavit in reply (encl 6).

[12] On 5 July 2023, ASP Che Intan bt Subri transmitted the investigation papers to the public prosecutor under s 4(9) of the SOSMA, and the applicant was subsequently charged for the offence under s 26D of the ATIPSOM at Baling Sessions Court on 12 July 2023.

ISSUES

[13] The applicant raised several issues with regard to the merits of the application, namely as follows:

(a) failure of the respondents to notify the next-of-kin pursuant to para 5(1)(a) of the SOSMA;

(b) failure to give counsel access to the applicant's even after 48 hours has lapsed as prescribed under para 5(1)(b) of the SOSMA and such delay resulted in the detention being invalid and unlawful;

(c) the letter denying the right to consult counsel under para 5(1)(b) of the SOSMA was signed by one DSP Syamsul bin Sinring and not a Superintendent of Police, and thus has no authority to do the same;

(d) the prerequisite to the application of the SOSMA is not satisfied by the respondents to warrant the applicant to be detained under SOSMA, ie, acting in concert with '... substantial body or person' as in its Preamble;

(e) applicant's detention is vague and ambiguous ie whether applicant was first detained for 24 hours, then only detained for further 28 days, or straight 28 days detention under Superintendent of Police's order; and

(f) failure to give reasons for the arrest pursuant to sub-s 4(2) of the SOSMA.

ANALYSIS AND FINDING

Whether the applicant's application has become academic

[14] Initial objection by the parties on the issue of whether the applicant's application has been rendered academic stems from the fact that the applicant was charged at the Baling Sessions Court a day before the application was heard before this court.

[15] Referring to the facts in *Tanasilan a/l Nakethiran v Public Prosecutor & Ors* [2023] 7 MLJ 632; [2022] 9 CLJ 462, where the facts of the case are similar to the present case, the initial application for a writ of habeas corpus was dismissed as the High Court ruled that the said application was then rendered academic. Upon appeal to the Federal Court, the appeal was allowed and the decision of the High Court was set aside, whereby the said application was then returned to the High Court to be heard on its merits.

[16] Looking at the facts of the case of *Tanasilan a/l Nakethiran*, it is clear from the decision of the Federal Court that even though when the application came up for hearing before the High Court, the applicant is no longer detained under sub-s 4(5) of the SOSMA, such status did not render the application academic and the High Court shall hear the application on its merits.

[17] Nevertheless, as the respondents admitted that the academic issue was no longer a valid reason for the non-hearing of the applicant's application on merits, this court will not make a further finding on this matter.

Habeas corpus application

[18] This court has decided that the preliminary objection by the respondents on the effect of granting a writ of habeas corpus when the applicant is under a remand order of the court shall be dealt with after the hearing of the applicant's application on merits.

[19] There are six issues raised by the applicant as highlighted in para 13 above.

Issue (a): Failure of the respondents to notify the next-of-kin pursuant to para 5(1)(a) of the SOSMA

[20] Subsections 5(1) and 5(2) of the SOSMA states:

> (1) When a person is arrested and detained under section 4, a police officer conducting investigation shall —
>
> (a) immediately notify the next-of-kin of such person of his arrest and detention; and
>
> (b) subject to subsection (2), allow such person to consult a legal practitioner of his choice.

(2) A police officer not below the rank of Superintendent of Police may authorize a delay of not more than forty-eight hours for the consultation under paragraph (1)(b) if he is of the view that —

(a) there are reasonable grounds for believing that the exercise of that right will interfere with evidence connected to security offence;

(b) it will lead to harm to another;

(c) it will lead to the alerting of other person suspected of having committed such an offence but who are not yet arrested; or

(d) it will hinder the recovery of property obtained as a result of such an offence.

[21] The applicant submitted that the respondents had failed to comply with sub-s 5(1) of the SOSMA as deposed by the applicant's wife in her affidavit in support (encl 2). She was at all material time residing at the address as per stated in her affidavit in support.

[22] The respondents averred that efforts had been made to contact the applicant's wife, however, two phone calls made to her number which is 019–9401216 were never answered (para 7 of encl 7). ASP Che Intan bt Subri then proceeded to contact Khoo Wan Ching who is said to be the applicant's lawyer, who then appeared at the IPD Alor Setar, Kedah, and had signed the acknowledgment as in exh CI2 of encl 7.

[23] Subsection 5(1) of the SOSMA clearly provides that notification shall be made to the *next-of-kin*. In *Re application by Tengku Ahmad Tajudin bin Tengku Ibrahim* [1984] 2 MLJ 231, it was decided as follows:

> At common law, *the expression 'next-of-kin' simpliciter does not have a technical meaning but merely denotes the most nearly related relative or kin*. So, when a settlor gives his property to 'next-of-kin' of himself or another, the expression is construed to mean next-of-kin in the strict sense of next in degree of kindred. The degrees of kindred are reckoned according to civil law both upwards to the ancestors and downwards to the issue, each generation counting for a degree. Thus, from father to son is one degree, from grand-father to grand-son, or vice versa, is two degrees and from brother to brother, two degrees, namely, one upwards to the father and one downwards to the other son. So, from uncle to uncle or nephew, or vice versa, is three degrees. (Emphasis added.)

[24] And 'relative' according to the *Oxford Learner's Dictionary* means 'a person who is in the same family as somebody else'. This simply means that 'next-of-kin' refers to somebody who is closely related and has a family relationship with the applicant.

[25] Looking at the facts of the applicant's application as transpired by all the documents put forth, it is clear that Khoo Wan Ching was not a family member nor relative of the applicant, and therefore it is the finding of this court that the respondents have not discharged their duty to notify the applicant's next-of-kin as required under sub-s 5(1) of the SOSMA. Such notification cannot be substituted with any other person other than the next-of-kin.

[26] Furthermore, the explanation given by ASP Che Intan bt Subri that she had tried to contact the applicant's wife two times but her calls were never answered, is in the opinion of this Court, not enough to discharge her duty under sub-s 5(1) of the SOSMA as she would have other resources to effect the notice, either by trying to obtain the handphone numbers of other family members of the applicant who is residing in the same house or by going to the applicant's residence as it is clear from the arrest report that the respondents had obtained the address of the applicant. The respondents should have done more to comply with this provision as it relates to the freedom of a person protected under the Federal Constitution.

[27] The respondents also submitted that the notification to the next-of-kin is not a procedural requirement to inform the grounds and reasons for the applicant's arrest but merely a requirement of the law to inform of his arrest and detention. Therefore, the respondents submitted that they had complied with the requirement provided for under SOSMA.

[28] Paragraph 5(1)(a) of the SOSMA was enacted as a safeguard to the powers given to the authority for the arrest and detention under s 4. This can be seen from the *Penyata Rasmi Parlimen Dewan Rakyat* (Hansard) dated 16 April 2012 (DR-16042012) where it was stated as follows:

> Tuan Yang di-Pertua, *menyedari bahawa rang undang-undang ini digubal di bawah Perkara 149 dan ia membenarkan penahanan individu oleh pihak polis untuk tujuan siasatan yang luar daripada norma kebiasaan tatacara jenayah dan undang-undang keterangan yang lazim, maka kerajaan telah mengambil keputusan mengadakan beberapa lindung jamin atau safe guard* dengan izin, seperti berikut.
>
> ...
>
> Tuan Yang di-Pertua, *lindung jamin keempat ialah fasal 5 memperuntukkan bahawa apabila seorang ditangkap dan ditahan di bawah fasal 4, polis yang menjalankan penyiasatan hendaklah memberitahu waris kadim atau next of kin orang yang ditangkap dan ditahan itu sesegera mungkin mengenai penangkapan dan penahanannya*. Pihak polis juga hendaklah memenuhi hak mengguami atau dengan izin, right to attorney si ditahan tidak lewat daripada 48 jam. (Emphasis added.)

[29] Looking at the scheme of SOSMA, the safeguards laid down by the Legislature are intended to protect the rights of the detainee upon any unlawful arrest and detention. If it is accepted that the right to notify the next-of-kin

does not amount to mandatory procedural requirements, then it would defeat the purpose of the safeguards as per intended by the Legislature. The effect would also lead to arbitrary arrest or detention as the detaining authority would not be bothered to inform any family members of such arrest or detention and no family members would be aware of such detention. In the opinion of this court, this is not the intention of the Legislature when SOSMA was enacted.

[30] Therefore, it is the finding of this court that the failure to notify the applicant's next-of-kin under para 5(1)(a) of the SOSMA amounts to non-compliance with procedural requirements under SOSMA.

Issue (b): Failure to give counsel access to the applicant even after 48 hours has lapsed as prescribed under para 5(1)(b) of the SOSMA and such delay resulted in the detention being invalid and unlawful;

Issue (c): The letter denying the right to consult counsel under para 5(1)(b) of SOSMA was signed by one DSP Syamsul bin Sinring and not a Superintendent of Police, and thus has no authority to do the same

[31] The two issues above were submitted together by both parties and will be dealt with in the same manner by this court as it involved the same issue which is the right to consult counsel.

[32] The applicant submitted that his right to counsel was denied even after the 48 hours period as prescribed in para 5(1)(b) of the SOSMA has expired. Having failed to get in touch with the applicant, the deponent appointed Messrs Fatt & Co as their counsel and via two letters dated 25 June 2023, requesting (1) — to obtain information and documents relating to the arrest of the applicant, and (2) — to have access to the applicant to afford him with legal counsel. Both letters were received by 'Pej Ketua Bahagian Siasatan Jenayah Daerah Kota Setar Kedah' on the same day, as exhibited in exhs FLY1 and FLY2 of the deponent's affidavit in support (encl 2).

[33] The appointed counsel then received a letter dated 27 June 2023 signed by DSP Syamsul bin Sinring denying the appointed counsel access to the applicant pursuant to sub-s 5(2) of the SOSMA (exh FLY3 of the deponent's affidavit in support).

[34] The respondents argued and submitted several case laws in relation to the denial to consult counsel. Such right starts from the day of the arrest but cannot be exercised immediately after arrest if it impedes polis investigation or the administration of justice (*Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198; [1975] 1 LNS 117 and *Hashim bin Saud v Yahaya bin Hashim & Anor* [1977] 2 MLJ 116; [1977] 1 LNS 32).

[35] On the letter exhibited in exh FLY3 (encl 2), the respondents admitted that the impugned letter was signed by DSP Syamsul bin Sinring, the Head of the Criminal Investigation Department of IPD Kota Setar, Kedah. However, the letter is dissimilar from the authorization for the delay by ACP Ahmad Shukri bin Mat Akhir as exhibited in exh AS2 of encl 6. The authorisation was given by a police officer 'not below the rank of Superintendent of Police' and had therefore fulfilled s 5(2) of the SOSMA.

[36] Subsection 5(2) of the SOSMA states:

> (2) A police officer not below the rank of Superintendent of Police may authorize a delay of not more than forty-eight hours for the consultation under paragraph (1)(b) if he is of the view that —
>
> (a) there are reasonable grounds for believing that the exercise of that right will interfere with evidence connected to security offence;
>
> (b) it will lead to harm to another;
>
> (c) it will lead to the alerting of other person suspected of having committed such an offence but who are not yet arrested; or
>
> (d) it will hinder the recovery of property obtained as a result of such an offence.

[37] Referring to all documents set forth before this court, it is obvious that the delay of access to counsel in relation to this application refers to two occasions. The first authorisation for the delay was issued by ACP Ahmad Shukri bin Mat Akhir as exhibited in exh AS2 of his affidavit in reply (encl 6). And the second delay of access to counsel was as per the letter signed by DSP Syamsul bin Sinring exhibited in exh FLY3 of the deponent's affidavit in support (encl 2).

[38] This court finds that exh AS2 was authorized by a police officer not below the rank of Superintendent of Police as required by sub-s 5(2) of the SOSMA. The authorisation was also done upon the officer's satisfaction of the reasons as stipulated under sub-s 5(2) of the SOSMA, and such delay was then informed to the applicant where the applicant acknowledged his understanding.

[39] Therefore, this court is of the opinion that the first authorization to delay the right to consult counsel was executed according to sub-s 5(2) of the SOSMA, and such delay expires on 24 June 2023.

[40] The next question then arose as to who had given authorisation for the second delay of access to consult counsel, since the respondents argued that the

letter by DSP Syamsul bin Sinring is dissimilar to the authorization given by ACP Shukri bin Mat Akhir as in encl 6. A

[41] And even if there is authorization given by ACP Shukri bin Mat Akhir, the authorisation had already expired by the time the appointed counsel issued the letter as in exh FLY2 of the deponent's affidavit in support (encl 2). B

[42] Another question is when does the 48 hours delay of the right to consult counsel begin? Does it begin from the date of the arrest or does it begin from the day an application is made to the detaining authority for the rights to consult counsel be exercised? C

[43] Referring to the case of *Hashim bin Saud*, the right to consult counsel begins from the date of the arrest. Therefore, in this application, the computation of 48 hours delays of the right to consult counsel can only be effective until 24 June 2023. D

[44] Furthermore, ACP Shukri bin Mat Akhir in his affidavit in reply (encl 6) in para 9 clearly states the following: E

> Saya telah menerangkan mengenai penangguhan hak Pemohon untuk berunding dengan pengamal undang-undang pilihan Pemohon sendiri di bawah seksyen 5(1)(b) Akta tersebut untuk tempoh selama empat puluh lapan (48) jam mulai *22-06-2023* jam *11 pagi* hingga *24-06-2023* jam *11 pagi* dalam Bahasa Melayu. F

[45] Looking at para 5(1)(b) and sub-s 5(2) of the SOSMA, this court is of the opinion that SOSMA only allows a single delay of the right to consult counsel, and that right begins from the day of the arrest. Once the 48 hours have lapsed, there can be no further delay of the right to consult counsel as had been done in the case of the applicant. G

[46] This court also finds that the delay of the right to consult counsel as stated in exh FLY3 (encl 2) was done without proper authorisation and after the expiry of the 48 hours allowed by the law and therefore, had breached para 5(1)(b) and sub-s 5(2) of the SOSMA. H

[47] The respondents further argued that even if there is non-compliance to sub-s 5(2) of the SOSMA, such denial of access cannot be a ground for the grant of a writ of habeas corpus. I

[48] With regard to this issue, this court refers to the case of *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449; [2002] 4 CLJ 309, where Siti Norma Yaakob FCJ stated:

A Can habeas corpus lie to secure the immediate release of the appellants? I answer this by referring to some authorities.

In *Lee Mau Seng*, it was held that such a remedy is not available to persons like the appellants who after their arrests and under lawful detentions were refused their constitutional right under the second limb of under art 5(3).

B *Ooi Ah Phua* followed *Lee Mau Seng* and habeas corpus was refused on the ground that it is possible for a person to be lawfully detained and unlawfully denied communication with his lawyer.

Likewise in refusing to free an arrested person in police custody in the Indian case
C of *Sundar Singh v Emperor* [1930] AIR Lahore 945, Bhide J, had this to say.

It was argued by his counsel that the police custody became 'improper' as the police refused to allow even the prisoner's legal adviser to have access to him. This is somewhat a debatable point, and although I have come to the conclusion that the police were not justified in refusing the prisoner to be interviewed by his legal
D adviser, I think, this cannot by itself be considered to be sufficient ground for setting him at liberty at once in the circumstances of the case.

The rationale for refusing habeas corpus in the three cases that I have cited seems to be this. A complaint by a person while under lawful detention that he has been refused access to counsel contrary to the second limb of art 5(3) will not have the
E effect of rendering his detention unlawful and that habeas corpus is not the proper remedy. It would be otherwise if for example there has been a failure to inform the person arrested of the grounds of his arrest, contrary to the first limb of art 5(3) and such failure would render his subsequent detention unlawful. *Clearly, it is the legal status of the detention that determines whether habeas corpus can issue to secure the*
F *freedom of a detained person as guaranteed by art 5(2) of our Federal Consitution.*

Denial of access is not the only ground relied by the apellants to secure their freedom. From the judgments of my learned brothers, Mohamed Dzaiddin, CJ, Steve Shim Lip Kiong, CJ (Sabah & Sarawak) and Abdul Malek Ahmad FCJ, the appellants have succeeded in establishing that their detentions under s 73(1) of the ISA are unlawful on
G *grounds other than denial of access.* Under these circumstances habeas corpus will issue to secure their release, insofar as the first, third, fourth and fifth appellants are concerned.

[49] Based on the decision of *Mohamad Ezam* above, such a breach does not
H authorise this court to issue a writ of habeas corpus solely on this ground.

[50] However, the decision of *Mohamad Ezam* above was evaluated in *Gunasingam a/l Kolasegaram dan lain-lain lwn Timbalan Menteri Keselamatan Dalam Negeri Malaysia dan lain-lain* [2006] 2 MLJ 363; [2005] 1 LNS 169,
I where the High Court states:

HAK UNTUK DIWAKILI OLEH PEGUAM

102. Semasa membincangkan perkara 5(3) Perlembagaan dalam kes Kam Tech Soon, Mahkamah Persekutuan tidak pula membincangkan cabang kedua perkara 5(3) itu.

103. *Sekiranya dikatakan bahawa oleh sebab sub-s 3(1) Ordinan tidak menghendaki alasan tangkapan dan penahanan di bawah subseksyen itu diberitahukan kepada orang yang ditangkap dan ditahan itu maka alasan itu tidak perlu diberitahukan dan itu tidak bertentangan dengan perkara 5(3) Perlembagaan Persekutuan, maka saya berpendapat, sebagai lanjutan daripada itu, bahawa oleh sebab s 3 Ordinan tidak memperuntukkan bahawa orang yang ditahan mesti diberi hak untuk berunding dengan dan diwakili oleh peguam pilihannya, maka dia tidak perlu diberi hak sedemikian dan penafian hak itu tidak bercanggah dengan cabang kedua perkara 5(3) itu.*

104. Dalam kes Mohamed Ezam bin Mohd Noor, YA Siti Norma HMP (ketika itu) telah membincangkan peruntukan perkara 5(3) Perlembagaan Persekutuan berkaitan dengan hak untuk diwakili oleh peguam. Beliau memutuskan bahawa undang-undang tentang tahanan pencegahan di bawah perkara 149 masih tertakluk kepada peruntukan perkara 5(3) tentang hak untuk diwakili peguam. Bagaimanapun, bagi menjawab persoalan sama ada habeas corpus boleh digunakan untuk membebaskan seseorang yang ditahan di bawah s 73(1) Akta Keselamatan Dalam Negeri 1960 kerana hak itu dinafikan, YA. Hakim itu berkata, (di ms 517) selepas merujuk kepada kes *Lee Man Seng v Minister for Home Affairs, Singapore & Anor* [1971] 2 MLJ 137, *Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198 dan *Sundar Singh v Emperor* 1930 AIR Lahore 945, bahawa:

> The rationale for refusing habeas corpus in the three cases that I have cited seems to be this. A complaint by a person while under lawful detention that he has been refused access to counsel contrary to the second limb of art 5(3) will not have the effect of rendering his detention unlawful and that habeas corpus is not the proper remedy.

105. *Oleh yang demikian, tiada asas untuk mengatakan bahawa tangkapan dan penahanan Pemohon Kedua tidak sah kerana dia dinafikan haknya untuk berunding dengan dan diwakili oleh peguam*. (Emphasis added.)

[51] The High Court decision in *Gunasingam a/l Kolasegaram* above was then analysed by the High Court in *Timbalan Menteri Dalam Negeri & Ors v Norazmi bin Ali* [2020] MLJU 1679, where the excerpts of the High Court decision are stated as follows:

> [32] In *Gunasingam a/l Kolasegaram*'s case, the issue before the court was regarding the Emergency (Public Order and Prevention of Crime) Ordinance 5, 1969 and the repealed Internal Security Act 1960 which did not specifically and expressly afford the detenu the right to be represented by an advocate. This was in fact the exact observation made by Zaharah Ibrahim J as can be seen below:
>
> > Sekiranya dikatakan bahawa oleh sebab sub-s 3(1) Ordinan tidak menghendaki alasan tangkapan dan penahanan di bawah subseksyen itu diberitahukan kepada orang yang ditangkap dan ditahan itu maka alasan itu tidak perlu diberitahukan dan itu tidak bertentangan dengan perkara 5(3) Perlembagaan Persekutuan, maka saya berpendapat, sebagai lanjutan daripada itu, bahawa oleh sebab s 3 Ordinan tidak memperuntukkan bahawa orang yang ditahan mesti diberi hak untuk berunding dengan dan diwakili oleh peguam pilihannya, maka dia tidak

A perlu diberi hak sedemikian dan penafian hak itu tidak bercanggah dengan cabang kedua perkara 5(3) itu.

[33] *On the other hand, the applicant's right to legal representation was enshrined in the Act and the Rules. See s 9 of the Act, rr 4(3), 5(2), 5(3), 6(3), Form I, Form II, and Form III of the Rules. Therefore, I am of the considered view that this particular contention by the learned Federal Counsel does not hold water.*

B

[34] *In a nutshell, on this issue, I found in favor of the applicant that there was indeed a breach of a mandatory procedural requirement under the Act and the Rules, which rendered the detention to be unlawful*. (Emphasis added.)

C

[52] Referring to the authorities cited above, this court is of the opinion that the requirement to allow the applicant to consult counsel under para 5(1)(b) of the SOSMA is specifically provided under the law, and that failure to provide such right tantamount to a breach of a mandatory procedural requirement
D under SOSMA.

[53] Furthermore, as highlighted earlier, the right to consult counsel is also one of the safeguards intended by the Legislature when SOSMA was enacted. The relevant portion of the *Penyata Rasmi Parlimen Dewan Rakyat (Hansard)* dated *16 April 2012 (DR-16042012)* clearly states as follows:
E

Tuan Yang di-Pertua, *lindung jamin keempat ialah fasal 5 memperuntukkan bahawa apabila seorang ditangkap dan ditahan di bawah fasal 4,* polis yang menjalankan penyiasatan hendaklah memberitahu waris kadim atau next of kin orang yang ditangkap dan ditahan itu sesegera mungkin mengenai penangkapan dan penahanannya. *Pihak polis juga hendaklah memenuhi hak mengguami atau dengan izin, right to attorney si ditahan tidak lewat daripada 48 jam.*
F

[54] Therefore, this court agrees with the applicant that the failure of the
G respondents to allow the applicant access to his counsel more so after the expiry of the 48 hours, renders the detention to be unlawful.

Issue (d): The prerequisite to the application of the SOSMA is not satisfied by the respondents to warrant the applicant to be detained under the SOSMA, ie, acting
H *in concert with '... substantial body or person' as in its Preamble*

[55] The applicant argued that there was no evidence submitted by the respondents to prove that the applicant is acting with 'substantial group of persons'. Having failed to furnish the necessary evidence, either by statement of
I facts in the affidavits or relevant document, exclude the applicant's connection or acting in concert with substantial group of persons. Bare allegations are insufficient to suppress a person's liberty. Thus, making the detention of the applicant an illegal detention.

[56] On the other hand, the respondents invited this court to carefully peruse through the Arrest Report as exhibited in exh CI1 of encl 7, where it is clear that the applicant was arrested together with three other persons for the suspicion of an offence under s 26A of the ATIPSOM.

[57] The respondents also submitted that the offence under s 26A of the ATIPSOM cannot be done by one person as it is usually done by a syndicate. Furthermore, it was also argued that the Parliament, by making Part IIIA of the ATIPSOM a scheduled offence under SOSMA, shows that it relates to the offence touching on and threatening national security on how it affects public order and security.

[58] The respondents further argued that SOSMA being a procedural law, cannot be in any way sufficient to denote and ascertain for sure the number of people involved in the suspected or investigated offence. Hence, this application is not the forum to argue on whether the elements of the crime have been fulfilled as it is up to the public prosecutor to bring a charge or not, upon completion of the investigation. Ultimately, the respondents argued that this issue is devoid of merit and should be dismissed by this court.

[59] In order to resolve this issue, this court must first ascertain the purpose of the enactment of SOSMA. The preamble of SOSMA states:

> An Act to provide for special measures relating to security offences for the purpose of maintaining public order and security and for connected matters.
>
> WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia —
>
> (1) to cause, or to cause a substantial number of citizens tofear, organized violence against persons or property;
>
> (2) to excite disaffection against the Yang di-Pertuan Agong;
>
> (3) which is prejudicial to public order in, or the security of, the Federation or any part thereof; or
>
> (4) to procure the alteration, otherwise than by lawful means, of anything by law established;
>
> AND WHEREAS Parliament considers it necessary to stop such action;
>
> NOW, THEREFORE, pursuant to Article 149 of the Federal Constitution IT IS ENACTED by the Parliament of Malaysia as follows:

[60] In addition, the *Penyata Rasmi Parlimen Dewan Rakyat* (*Hansard*) dated *16 April 2012 (DR-16042012)* clearly stated that the enactment of SOSMA allows *detention by the police for the purpose of investigation* outside the normal norm of criminal procedure and the law of evidence:

A Tuan Yang di-Pertua, menyedari bahawa rang undang-undang ini digubal di bawah Perkara 149 dan ia membenarkan *penahanan individu oleh pihak polis untuk tujuan siasatan* yang luar daripada norma kebiasaan tatacara jenayah dan undang-undang keterangan yang lazim, maka kerajaan telah mengambil keputusan mengadakan beberapa lindung jamin atau safe guard dengan izin, seperti berikut. (Emphasis B added.)

[61] Furthermore, as decided in *Tanasilan a/l Nakethiran v Public Prosecutor & Ors* [2023] MLJU 995, Noorin Badaruddin J observed as follows:

C [17] *SOSMA is a special measure to cater specific offences. Its First Schedule lists down the type of offences involved and which grants the rights to the executive body ie the Royal Malaysian Police the right to detain subjects up to 28 days for purposes of investigation*. It is highlighted to the Court that SOSMA is a module from the Essential Security Cases Regulation (ESCAR) that deals with security measures on organised notorious offences. As such, an uninterrupted investigation is intended. It is further D highlighted by the respondents that contrary to procedures for general offences, the police aims in finding evidence to fulfil the elements of charges. The respondents submit that investigation under SOSMA is delicate as the executive have to penetrate the group by identifying the networking and gathering evidence to paralyse the group's/gang's activity.

E According to the respondents, to paralyse the group's/gang's activity, it involves strategic, bigger scale and high risk planning and as such confidentiality of the investigation must be ensured and not compromised with. In other words, the respondents say that any involvement of any parties at the investigation stage eg reporting of the status of investigation in the media will jeopardise greatly the F investigation strategy of the police force.

[62] Based on the authorities cited above, it is clear that the detention or extended detention under SOSMA is specifically catered for the purpose of completing the investigation. Only when the investigation has been G completed, can the public prosecutor decide whether to charge a detainee in court for an offence or otherwise. At the investigation stage, what needs to be done by the investigating party is to obtain evidence to fulfill the elements of the charge. This is why this court agrees with the respondents that this is not the proper forum to be determining the elements of the charge. What is being done H by the detaining authority is to seek evidence for the purpose of prosecution or release of the detainee. Whether the applicant has been connected to or having in concert with a substantial group of persons is something that has to be determined by the court upon an institution of prosecution. Having said that, this court is of the view that the arguments put forth by the applicant on this I issue would be devoid of merit.

[63] In addition, as stated earlier, the purpose of the detention and extended detention under SOSMA is to complete the investigation, the object is thus different than detention under Prevention of Crime Act 1959 ('the POCA'),

Dangerous Drugs Act (Special Measures) Act 1971 (Act 316) as well as the repealed Internal Security Act 1960 (Act 82), where the purpose of those laws is for detention without trial.

[64] In *Tanasilan a/l Nakethiran* above, Noorin Badaruddin J explained as follows:

> [25] *It is apposite to note that unlike the Dangerous Drugs (Special Preventive Measures) Act 1985, SOSMA is not a law that allows for detention without trial. Pursuant to sub-s 4(5) of the SOSMA, the detenu must be either be brought to court for a charge to be preferred against him or be released within 28 days. Nonetheless, given that it is a special law that is enacted to provide for special measures relating to security offences for the purpose of maintaining public order and security and all connected matters as per the title and preamble, the executive is legally authorised by SOSMA to exercise the power of detention for purposes of investigation.* So, it cannot be gainsaid that the executive detention under sub-s 4(5) of the SOSMA lack legal authorisation and therefore prohibited because there is in existence such powers clearly prescribed under the law ie SOSMA, which is enacted pursuant to art 149 of the FC. (Emphasis added.)

[65] Therefore, based on the arguments and authorities cited above, this court is of the view that this issue is devoid of merit.

Issue (e): applicant's detention is vague and ambiguous ie whether applicant was first detained for 24 hours, then only detained for further 28 days, or straight 28 days detention under Superintendent of Police's order.

[66] The applicant argued that the actual date of the applicant's arrest is vague and ambiguous. It was submitted that the applicant's actual arrest was done on 21 June 2023 and not on 22 June 2023 as alleged by the respondents.

[67] This ambiguity, as submitted by the applicant, can be seen from the arrest report (Alor Setar/014362/23) made by ASP Che Intan bt Subri as exhibited in exh AS1 of her affidavit in reply (encl 7). The relevant portion of the report states:

> Seterusnya saya tangkap kesemua penama tersebut dibawah peruntukkan seksyen 4 Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 (Akta 747) *kerana disyaki melakukan kesalahan bersangkut Alor Setar Repot: 14264/23 bagi tujuan menjalankan siasatan lanjut dibawah seksyen 26A ATIPSOM 2007* (Pegawai Penyiasat: ASP Che Intan binti Subri). (Emphasis added.)

[68] Based on the police report mentioned above and also the admission by ASP Che Intan bt Subri in para 5 of her affidavit in reply (encl 7), it is clear that the applicant was arrested at the IPD Kota Setar, together with three other persons. And as it was highlighted in the arrest report itself that the arrest of the applicant on 22 June 2023 was made pursuant to another police report which

is Alor Setar Report 14264/23, it now suggests that there may be a possibility that the applicant may have been arrested earlier than 22 June 2023.

[69] The actual date of arrest of a detainee is of utmost importance because it determines the computation of the extended detention as stipulated in sub-s 4(5) of the SOSMA.

[70] Subsections 4(4) and 4(5) of the SOSMA reads:

> 4(1) A police officer may, without warrant, arrest and detain any person whom he has reason to believe to be involved in security offences.
>
> (2) A person arrested under subsection (1) shall be informed as soon as may be of the grounds of his arrest by the police officer making the arrest.
>
> (3) No person shall be arrested and detained under this section solely for his political belief or political activity.
>
> (4) *The person arrested and detained under subsection (1) may be detained for a period of twenty-four hours for the purpose of investigation.*
>
> (5) *Notwithstanding subsection (4), a police officer of or above the rank of Superintendent of Police may extend the period of detention for a period of not more than twenty-eight days, for the purpose of investigation.* (Emphasis added.)

[71] Not having the certainty of the arrest date of the applicant may lead to a detention of more than 28 days and may lead to unlawful detention of the detainee. Looking at the circumstances leading to the arrest of the applicant in this application, this court agrees with the applicant's argument that there is ambiguity over the actual date of the applicant's arrest.

[72] Referring to the Federal Court decision in *Mohammad Azanul Haqimi bin Tuan Ahmad Azahari v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 6 MLJ 220; [2019] 8 CLJ 465, where it was decided that any ambiguity or two inferences should be resolved in the favour of the applicant:

> [18] *It has always been the case with our criminal law that where there are two inferences open against the accused, especially in the face of conflicting evidence, the one most favourable to the accused is to be preferred*. See generally: *Yusoff Kassim v Public Prosecutor* [1992] 2 MLJ 183; [1992] 3 CLJ 1535; [1992] 1 CLJ Rep 376 (Supreme Court). *We did not see why the approach should be any different in respect of detainees in habeas corpus cases. After all, laws which deprive a subject of his right to personal liberty ought to be accorded the same strict construction as penal laws*. In *Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri & 1 Lagi* [1994] 3 MLJ 285 at p 293; [1994] 4 CLJ 47, at p 55, Wan Yahya SCJ had this to say:
>
> > Laws which deprive the subjects of their rights to personal liberty are subject to strict construction in the same way as penal laws — see *Nagin Singh v Jagannath* AIR 1944 Lah 422.

[73] Based on the authority of *Mohammad Azanul Haqimi bin Tuan Ahmad Azahari* above, this court finds that ambiguity on the actual date of the applicant's arrest should be resolved in favour of the applicant. This is pivotal as it relates to the powers of the police to extend the detention for not more than 28 days. Any extension of detention of more than 28 days shall render the detention unlawful.

Issue (f): Failure to give reasons for the arrest pursuant to s 4(2) of the SOSMA

[74] The applicant also added the issue of the failure of the respondents to give reasons for the arrest pursuant to sub-s 4(2) of the SOSMA. It was argued that the arrest report of the applicant as exhibited in exh AS1 of encl 7 stated that the reasons for the applicant's arrest and his rights were explained to him pursuant to s 28A of the CPC. However, para 6 of ASP Che Intan bt Subri's affidavit in reply (encl 6) states that she had informed the reasons for the applicant's arrest and his rights pursuant to sub-s 4(2) of the SOSMA.

[75] These contradictions, according to the applicant, showed that the respondents had in actual fact never informed or explained the reasons for the applicant's arrest. The applicant also submitted that SOSMA provides specific provisions on this matter and therefore it supersedes any other provision relating to the same. Section 28A of the CPC cannot be used on an arrest under SOSMA.

[76] The respondents on the other hand, argued that although the arrest report and the facts transmitted in encl 7 refers to different set of laws, however, the effect is the same that the applicant was informed of the reasons for his arrest as protected under art 5(3) of the Federal Constitution. Therefore, the procedural requirement of informing the applicant of his reasons for arrest has been complied with.

[77] Both the provisions of sub-s 4(2) of the SOSMA and sub-s 28A(1) of the CPC are similar. It requires that the person arrested be informed as soon as may be of the grounds of his arrest by the police officer making the arrest.

[78] This court does agree with the applicant's argument that when there is a specific provision under a specific law, that provision supersedes any other provision relating to the same.

[79] This argument stems from the Latin maxim *generalia specialibus derogant*. Referring to *Abdullah bin Atan v Public Prosecutor and other appeals* [2020] 6 MLJ 727, the Federal Court had this to say:

A [53] Furthermore, the DDA is a specific Act relating to and dealing with trials in respect of dangerous drugs. The CPC, on the other hand, is a law of general application. *Where there is a conflict between a specific law and a general law, the conflict may be resolved in one of two ways. The first is via the maxim generalia specialibus derogant. The second is the doctrine of harmonious construction*. (Emphasis
B added.)

[80] In *Abdullah bin Atan*, the Federal Court referred to the case of *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119 and stated as follows:

C [54] The former Federal Court had the occasion to consider the operation of the CPC and the DDA in *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119. In *Chew Siew Luan*, the question was whether the provisions relating to bail in the CPC were applicable to a trafficking charge preferred under the DDA. The Federal Court unanimously held that the provisions of the DDA will apply to the exclusion of the CPC. This is what Raja Azlan Shah CJ (Malaya) (as His Majesty then was)
D said:

> Now, the Criminal Procedure Code (FMS Cap 6) which came into force on 1 January 1927 is an enactment regulating criminal proceedings in general in the former Federated Malay States. It was amended and extended throughout Malaysia by the Criminal Procedure Code (Amendment and Extension) Act,
E 1976 on 10 January 1976. It cannot be gainsaid that it is a written law within the meaning assigned in s 2 of the Interpretation Act 1967.
>
> The Dangerous Drugs Act 1952 (Revised — 1980) is an Act specifically designed to regulate the importation, exportation, manufacture, sale and use of, inter alia, dangerous drugs, and 'to make special provisions relating to the
F jurisdiction of courts in respect of offences thereunder and their trial, and for purposes connected therewith'. In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular that s 41B of the Act is an entirely new section introduced by the Dangerous Drugs
G (Amendment) Act 1978 (A A426) and became operative on 10 March 1978. *Generalibus specialia derogant is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law* ...
>
> It would be erroneous to apply expressions used and provisions made in one
H statute to another and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object. On the other hand, it is a sound, and, indeed, a well-known principle of construction of a statute that the purport of words and expressions used in a legislative measure must take their colour from the context in which they appear ... The provisions
I regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must ex necessitate yield to the specific provisions of s 41B of the Dangerous Drugs Act in that regard. We should perhaps also observe en passant that any other construction would result in nullifying the purport and effect of the

provisions of s 41B(1)(c) of the Dangerous Drugs Act ... (Emphasis added.)

[81] From the decisions cited above, it is clear that the maxim *generalia specialibus derogant* would be applicable when there is a conflict between a specific law and a general law. The two provisions being contended in this application speak of the same effect which is to be informed as soon as may be of the grounds of arrest. This, in the opinion of this court, does not show any conflict. The effect of both provisions is the same which is the arrested person shall be informed of his arrest as soon as may be, as enshrined by art 5(3) of the Federal Constitution. Based on this finding, this court finds that there is no merit on this issue as contended by the applicant.

Can the High Court issue a writ of habeas corpus when the applicant is under a remand order of the court?

[82] The final issue to be resolved by this court is whether this court can issue a writ of habeas corpus when the applicant is no longer under preventive detention, and has been charged in court and being detained under a remand order of the court.

[83] The respondents argued that even if the applicant's detention is illegal, this court cannot issue a writ of habeas corpus as the applicant is no longer being detained under a preventive order but instead is being remanded under an order of the court subsequent to the applicant being charged at the Baling Sessions Court on 12 July 2023.

[84] The applicant, however, argued that the habeas corpus application should be examined based on the detention at the time the application was filed which was on 1 July 2023. It was clear that when the application was filed, the applicant was still under the extended detention order issued by ACP Ahmad Shukri bin Mat Akhir on 22 June 2023 pursuant to sub-s 4(5) of the SOSMA. And the extended detention order would expire on 19 July 2023.

[85] The applicant refers to the Federal Court decision of *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* [2022] 3 MLJ 203; [2022] 3 CLJ 177 which states as follows:

> [136] We rejected these arguments and in so doing, reaffirmed *Zaidi bin Kanapiah* as representing the correct view on the subject. Without narrowing what has been reasoned at length above, we summarise our legal findings as follows:
>
> (i) *the High Court's constitutional duty to assess the legality of any detention — especially preventive detention — starts from the date of filing of the habeas corpus application assuming that the detainee was, at the time he filed it, under detention*. In this assessment, the court must scrutinise the legality of the detention from the lens of the detenu;

(ii) the jurisdiction of the High Court or a High Court Judge is not determined by the fact of physical detention but the legality of the detention itself assessed from the date of the filing of the application for habeas corpus;

(iii) viewed in this way and giving art 5(2) of the FC its fullest effect, the fact that the detenu was, subsequent to the date of the filing of his application, preventively detained by some other authority or under some other provision, legislation or order does not vitiate his right to judicial scrutiny over the legality of his initial detention;

(iv) similarly, the fact that the detenu is released after the date the application is filed, but before the return or hearing date, does not affect the jurisdiction of the court to review the legality of the detention which is under challenge; and

(v) finally the fact that the detenu is under detention during the hearing but released after an appeal to the Federal Court is filed, does not render the application 'academic'. The live issue before the Federal Court is no longer simply the detention but the correctness of the decision of the High Court as assessed from the lens of the High Court judge.

[137] More specifically in relation to the set of six appeals, the fact that the detention was one under s 19A of the POCA rather than s 4(1)(a) of the POCA did not render the applications academic as at the date of the filing of the application the six applicants were indeed detained under s 4(1)(a) of the POCA. Moreover, the application specifically seeks release from detention under the provisions of ss 3, 4 and any other provisions of the POCA. That in itself warrants the court inquiring into the matter in view of its mandatory constitutional duty of review under art 5(2) of the FC. The judge failed in his duty and erred in law when he failed to undertake the review and make a decision on this point, holding that it was academic.

[138] *With respect to the 19 applicants in the second set of appeals, again the fact that they are now free from detention under POCA, the relevant period of detention of six months having expired, in no way precludes them from challenging the decision of the High Court on the issue. As explained at length above, the issue remains 'live' on appeal*. (Emphasis added.)

[86] Relying on *Lei Meng* above, the applicant further submitted that the changing of restraining authority does not prevent this court to preside and decide on the applicant's application for a writ of habeas corpus to be issued. The excerpt of the decision referred to by the applicant is as follows:

[118] In short, the fact of physical custody and detention at the point of the hearing of the application is not a necessity in order for a court to grant the remedy. As stated earlier, the practice is that often where the detainee is in point of fact free from any form of detention, the application is withdrawn. *However, where detention changes from one part of restraining authority to another it can hardly be said that the person is no longer in preventive detention anymore*. To that extent the distinction made in *Faizal Haris* is, with the greatest of respect, artificial and is not borne out by either the passages in *Sharpe* nor the case of *Barnado v Ford*. (Emphasis added.)

[87] The applicant also submitted that the detention order under SOSMA as at the date of the filing of the application and the subsequent remand order of the court should be viewed as a single overarching transaction as laid down in the case of *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759.

[88] The applicant argued that based on the authorities cited above, the court has jurisdiction to issue a writ of habeas corpus as the matter should be decided upon the status of detention of the applicant at the date of the filing of the application, and not based on the date that the application came up for Hearing before this court.

[89] The respondents however, submitted that when the application first came up for Hearing on 13 July 2023, the applicant had already been charged under ATIPSOM and was denied bail pursuant to s 13 of the SOSMA. The applicant is therefore no longer under police detention under SOSMA but instead was detained under the order of the sessions court, and thus, the writ of habeas corpus is inoperable and ought not to be issued at this juncture.

[90] The respondents relied heavily on the authority of *Tanasilan a/l Nakethiran v Public Prosecutor & Ors* [2023] 7 MLJ 632; [2022] 9 CLJ 462, in which the same issue was canvassed. In that case, Rozmawar Rozain JC, even after considering the Federal Court decision case of *Lei Meng* above, had this to say:

> [34] To make a finding on whether the current remand faced by the applicant is tainted by the initial unlawful arrest under SOSMA, this court undertook to appreciate the analysis of the Federal Court's decision in *Lei Meng*.
>
> [35] *The position of the applicant here is hereby distinguished — as he is no longer in preventive detention.* A charge has been preferred against him under s 130V of the Penal Code and he is given an opportunity for a fair trial. Thus here, the facts and circumstance here is the exemption that the Federal Court ruled where the initial unlawful arrest could be clinically or surgically excised — the applicant was arrested under s 4(1) of the SOSMA and detained under s 4(5) of the SOSMA. The application for a writ of habeas corpus is against that.
>
> [36] There was no further detention under SOSMA as the applicant was charged under s 130V of the Penal Code and is currently in remand pending trial this month. This means the applicant is no longer under preventive detention of SOSMA. He is being accorded a fair open trial under our criminal justice system. He is given the right to be heard and present his defence.
>
> [37] It is observed that the effect of the Federal Court's decision in *Lei Meng* pertaining to the 19 sets of appeals upon which detainees had already been released seems declaratory in nature. This is because although there is that declaration the habeas corpus applications ought to have been ordered, the effect of the remedy it brought (which is to physically release the 19 applicants) do not carry any physical difference to their position who are already free.

> [38] Coming back to the case at hand here, *the effect of this court's finding that the detention under SOSMA is unlawful wherein the writ of habeas corpus lies, may be inoperable. Though the applicant may have other remedies against the respondents in relation to that, the current remand of the applicant is no longer under the preventive law of SOSMA but as an accused person under the Penal Code, Criminal Procedure Code, to name a few*.
>
> [39] As such, the release and granting of freedom of the applicant must be through the legal channel now applicable under our Criminal Procedure Code and/or other appropriate laws, but not through a writ of habeas corpus, in terms of bail pending trial.

[91] The decision of the High Court in *Tanasilan* above is still pending appeal to the Federal Court.

[92] The respondents also submitted the case of *Public Prosecutor v Poovaneswaran a/l Rave* (Criminal Appeal No 05(HC)-207–11 of 2022(A)), where the same issue was raised, whereby through the Federal Court's order, it is explicit and without speculation that the decision of the judicial commissioner sitting in the High Court at Ipoh which allowed the respondent application for a writ of habeas corpus was set aside and the prosecution's appeal was allowed.

[93] Before the High Court, as reported in *Poovaneswaran a/l Rave v Public Prosecutor* [2022] MLJU 2996; [2022] 1 LNS 2766, Su Tiang Joo JC allowed a writ of habeas corpus even though the applicant, in that case, was first detained under sub-s 4(5) of the SOSMA but later was charged under s 26J of the ATIPSOM which is a security offence under First Schedule of SOSMA, due to the finding that the detaining authority had not discharged the burden of proving that the detention of the applicant beyond the first 24 hours is lawful.

[94] In addition, the respondents submitted that a writ of habeas corpus does not apply in this case when the sessions court did not grant bail and the fact that the applicant was charged under a Security Offence under SOSMA does not fall within a continuation of 'a single overarching transaction' in preventive law as decided in *Zaidi bin Kanapiah* and *Lei Meng*.

[95] The respondents argued further that the respondents named herein are not the detaining authorities, and that there is no issue with 'changing the goal post' as it involves a different field altogether which is contrary to the decision in *Lei Meng*.

[96] The respondent's further argument is based on the premise that the subsequent detention of the applicant involves a different jurisdiction once the

applicant was prosecuted, hence, the detention under SOSMA ended. The applicant is no longer under executive detention but under a judicial remand order pending trial.

[97] The respondents further reiterated that even if there are any transgressions on the part of the detention of the applicant under SOSMA, this court cannot issue a writ of habeas corpus as the applicant is no longer under any preventive detention.

[98] The respondents also posed a question of how can a writ of habeas corpus be executed should this court decides that there is

non-compliance with mandatory procedural requirement of the detention under SOSMA and decided to issue a writ of habeas corpus.

[99] In response to the respondent's submissions, the applicant further submitted that the fact that the applicant had been charged in court for the offence under ATIPSOM and that there are other remedies to secure his release, does not bar this court from issuing a writ of habeas corpus should this court finds that the detention of the applicant under SOSMA to be unlawful.

[100] The applicant relied on the authority of *Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279, which states:

> I wholly agree with these decisions in this respect and am further fortified in my view by the fact, as I have stated earlier, that the applicant is alleging a breach of his fundamental right of personal liberty. *I accordingly hold that he is not precluded from making this application at this stage notwithstanding his right to make and the pendency of such representations to an Advisory Board under the Ordinance*.

[101] The applicant also argued that this court should not consider the Federal Court decision in *Public Prosecutor v Poovaneswaran a/l Rave* (Criminal Appeal No 05(HC)-207–11 of 2022(A)) (unreported) which was relied upon by the respondent, since there was no written judgment for the decision. It is trite law that a decision that is delivered without the written grounds does not establish any principle or rule of law on which the decision is founded, as was decided by the Federal Court in *Tetuan Wan Shahrizal, Hari & Co v Public Prosecutor* [2023] 4 MLJ 1.

[102] The applicant further reiterated that this court should not be concerned over how the writ of habeas corpus would be executed, should the court decide that the detention of the applicant be unlawful, but to leave the matter of execution of the writ of habeas corpus to another time as and when it arises.

[103] After listening to the lengthy submissions by both parties and considering all the facts that transpired before this court, this court must now decide on whether in this application, a writ of habeas corpus would be the proper remedy.

[104] In order for this court to make a proper finding on this issue, this court should first carefully scrutinise all the authorities cited by both parties.

[105] The first issue is on whether this court has jurisdiction to hear the application since the detention of the applicant had been taken over by event, upon his being charged in the Sessions Court at Baling for the offence under ATIPSOM and was denied bail.

[106] As argued by the applicant, and referring to the decision in *Lei Meng* above, this issue has not become academic since the filing of the application was done before the applicant was charged in court.

[107] The facts in *Lei Meng* refer to the detention of the 25 appellants under POCA. The preliminary issues concerned stem from the fact that six of the appellants were later detained under a different provision of POCA whereas the rest were released. The Federal Court in that case had this to say:

> [111] The legal proposition made here is that an application for habeas corpus can only be directed against a presently subsisting order of detention, such that once an order under s 6 of the DDSMPA is pronounced, any application for release or habeas corpus from detention by reason of deficiencies or non-compliance under s 3(1) and (2) of the DDSMPA, stand extinguished. The entitlement of a complainant to have the legality of his detention under those provisions examined by the courts is lost. This in effect means that a detaining authority is at liberty to halt the detention under a particular provision and issue a further order under a different provision of the same legislation to avoid any scrutiny of the deficiencies or irregularities in the earlier detention.
>
> [112] *Such a legal stance is at odds with the rationale that has been put forward earlier on in Ezam, Zaidi bin Kanapiah and this judgment. As stated earlier on in this judgment, in every habeas corpus application challenging detention, the inquiry by the court focuses on the application as of the date of filing of the same. As long as the person was in detention at that point in time, the inquiry may proceed*. But in *Faizal bin Haris* that entitlement is effectively removed. For the reasons set out earlier this is not a tenable proposition. (Emphasis added.)

[108] Based on the authority of *Lei Meng* above, this court is of the opinion that although at the time of the Hearing of the applicant's application, the applicant has been charged in court for an offence under ATIPSOM, however as the application was filed prior to the prosecution in the respective court, the

application remains a live issue which this court is within its jurisdiction to hear and decide upon.

[109] The next issue was on the 'single overarching transaction' which the applicant is relying upon to support their contention that the writ of habeas corpus is the proper remedy. The authority concerned is the Federal Court decision in *Zaidi bin Kanapiah* above.

[110] In *Zaidi bin Kanapiah*, the three appellants were initially detained by the Malaysian Anti-Corruption Commission ('MACC'). Upon their release on MACC bail, they were arrested by police under POCA on the grounds that they were involved in the organisation and promotion of unlawful gaming. They were then produced before a magistrate who ordered their 21 days remand under sub-s 4(1) of the POCA. The appellants applied for the writs of habeas corpus before the 21 days detention expired. However, before the hearing of their application, the police detained from the magistrate a second order under sub-s 4(2) of the POCA.

[111] It was decided in *Zaidi bin Kanapiah* that the detentions must be looked at as a whole. The decision of the Federal Court can be seen as follows:

> [28] At the time the preliminary objection came to be decided, it was a bench of five comprising Dzaiddin Chief Justice, Wan Adnan PCA, Steve Shim CJ (Sabah and Sarawak), Abdul Malek Ahmad FCJ (as he then was) and Siti Norma Yaakob FCJ (as she then was). Wan Adnan PCA passed away after the decision on the preliminary objection. *The ratio in Ezam's case is that detentions must be looked at as a whole. If the detention is found to be lawful, then the matter is not academic.* Applying the ratio in Ezam to these appeals, as the learned JC found that the appellants' detention was lawful, I conclude that the present appeals are not academic.
>
> ...
>
> [40] *Ezam when read properly and in context posits the ratio decidendi that the legality of a detention or detentions must be viewed as a single overarching transaction. This is because the legality of the detention must be addressed at the time the application for habeas corpus was made. The subsequent release (and by extrapolation the extended detention) in light of a finding of lawfulness or unlawfulness of the initial detention renders the entire issue of detention a live matter. Faizal bin Haris* rejected this view on the basis of English and common law authorities and by referring to local judgments which referred to such authorities. For instance, at pp 318–319 (MLJ); p 628 (CLJ), Augustine Paul FCJ noted as follows:
>
> > Thus, any irregularity in a detention order made under s 3(2) when it has been superseded by one under s 6(1) is not a relevant matter for consideration. In this regard *The Law of Habeas Corpus* (2nd Ed) by RJ Sharpe says at p 179:
> >
> > *It has been held consistently that the relevant time at which the detention of the prisoner must be justified is the time at which the court considers the return to the writ. This rule means that nothing which has happened before the present cause of*

A *detention took effect will be relevant to the issue before the court, unless by reason of some special consideration arising from the particular proceedings.*

And at p 186:

On the present state of the law, in almost every instance, the relevant time at
B which the detention is to be justified is the time at which the court considers the case. Prior illegality will not be relevant unless by reason of some special rule derived from the particular nature of the proceedings involved.' (Emphasis added.)

C **[112]** Looking at the facts in *Zaidi bin Kanapiah*, the 'single overarching transaction' refers to the initial 21 days detention under sub-s 4(1) of the POCA, and then the subsequent order of detention for a further period of 38 days under sub-s 4(2) of the POCA. Both were still preventive detention, although issued under different sections of POCA.
D

[113] Even on the same issue, the Federal Court in *Lei Meng* also had this to say:

[125] At para 101 of *Goh*, the majority decision goes on to stipulate that as the only
E remedy in an application for a writ of habeas corpus is release of the detainee from the detention, if the detainee is no longer under detention the writ of habeas corpus ought not to issue. *We have addressed this issue at length earlier on to point out that if such an approach is adopted then the remedy afforded under art 5(2) of the FC will be rendered nugatory. That is why the application is determined on the basis of the date on*
F *which it is filed. So long as the detainee is under detention when the application for habeas corpus is filed, the remedy is available even if detention has changed from detention under one section of the legislation to another simply because the entirety of these provisions are interconnected and interlinked, comprising a series of steps taken to culminate in the detention order which preventively detains the detainee for some*
G *considerable length of time. That is why the term one overarching transaction is utilised.*

...

[128] When a detention which is the subject matter of challenge is considered in this context, it follows that as the focus is on the duty of the court to inquire into the legality of the detention *the fact that the de facto custody and detention of the applicant*
H *has passed on to a different gaoler or detaining authority, but under the same preventive detention legislation or even other detention, that cannot in itself prohibit the constitutional review from being undertaken by the court. That is why Zaidi bin Kanapiah referred to the several stages of detention under different sections of the same legislation as amounting to one overarching transaction*. And this is amply supported
I by Ezam as well as *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293 *which represent the more legally coherent legal proposition*.

[114] The Federal Court in *Lei Meng* then summarised its legal findings at p 239 as follows:

[136] We rejected these arguments and in so doing, reaffirmed Zaidi bin Kanapiah as representing the correct view on the subject. Without narrowing what has ben reasoned at length above, we summarise our legal findings as follows:

(a) the High Court's constitutional duty to assess the legality of any detention-especially preventive detention-starts from the date of filing of the habeas corpus application assuming that the detainee was, at the time he filed it, under detention. In this assessment, the court must scrutinise the legality of the detention from the lens of the detenu;

(b) the jurisdiction of the High Court or a High Court judge is not determined by the fact of physical detention but the legality of the detention itself assessed from the date of the filing of the application for habeas corpus;

(c) *viewed in this way and giving art 5(2) of the FC its fullest effect, the fact that the detenu was, subsequent to the date of the filing of his application, preventively detained by some other authority or under some other provision, legislation or order does not vitiate his right to judicial scrutiny over the legality of his initial detention*;

(d) similarly, the fact that the detenu is released after the date the application is filed, but before the return or hearing date, does not affect the jurisdiction of the court to review the legality of the detention which is under challenge; and

(e) finally the fact that the detenu is under detention during the hearing but released after an appeal to the Federal Court is filed, does not render the application 'academic'. The live issue before the Federal Court is no longer simply the detention but the correctness of the decision of the High Court as assessed from the lens of the High Court judge. (Emphasis added.)

[115] Upon careful consideration of the facts and decisions by the Federal Courts in both *Zaidi bin Kanapiah* and *Lei Meng*, this court is of the opinion that the facts in this application are to be distinguished. The 'single overarching transaction' as emphasized by the Federal Courts refers to preventive detention either by the same legislation or different legislation or even under different detaining authorities. In this application, although the initial detention was preventive detention, however, the subsequent detention is no longer preventive detention as it is a detention pursuant to an order of a court of competent jurisdiction imposed upon a prosecution being instituted against the applicant. This situation, in the opinion of this court, could not attract the 'single overarching transaction' as per submitted by the applicant.

[116] This court also scrutinised the decision of *Tanasilan a/l Nakethiran* above, which was heavily relied on by the respondents. The facts in that case are similar to the applicant's application and the Hight Court decided as follows:

[30] Next is to address the effect of such decision. In arriving at this hearing before this court, the applicant was (after the filing of this application and before the

28-day period detention expired) charged under s 130V of the Penal Code on 13 July 2021. The applicant is now in remand pending his trial this month. Thus, the applicant is now no longer under preventive detention.

[31] In assessing the remedy of habeas corpus in our jurisdiction, the Federal Court in *Lei Meng* considered amongst others, the scenario where an applicant may be further detained under the preventive laws or even released. It was decided at paras 87–90 that:

> The full and proper constructions to be afforded to art 5(2) of the FC is that the court looks at the application as if it were a s 4(1) of the POCA detention, and if such detention is tainted, then it follows that any other detention ensuing from it, must be similarly tainted, because they both stem from the same series of transactions under the same legislation, namely POCA. The fact that the initial remand and detention was tainted cannot be ignored or swept under the carpet, allowing for continued detention under separate but related provisions of POCA.
>
> This is evident from a perusal and construction of PCA in its entirety, where it may be noted that it comprises a series of mandatory or imperative provisions which have to be complied with prior to proceeding on to the subsequent bases for such preventive detention. The sections are all predicated on each other, such that it is not possible to read each section as comprising a complete and entire basis for the initial or continued detention of the detainees.
>
> In short, POCA is not a legislation providing for a series of truncated detentions. Each segment of the detention under POCA is related to the former. The net consequence is that any subsequent action taken to place the detainee under a new or separate form of detention, or even to release the detainee, does not undermine or stultify the court's express duty to scrutinise the earlier detention with a view to satisfy itself that such earlier detention is indeed legal and valid under the relevant preventive detention laws.

[32] *Thus, the subsequent preventive orders cannot be truncated from the initial tainted detention as the whole preventive legislation is viewed as one overarching transaction since each detention order is premised upon one another. That is not applicable to the situation of the applicant here.*

[35] *The position of the applicant here is hereby distinguished — as he is no longer in preventive detention. A charge has been preferred against him under s 130V of the Penal Code and he is given an opportunity for a fair trial. Thus here, the facts and circumstance here is the exemption that the Federal Court ruled where the initial unlawful arrest could be clinically or surgically excised* — the applicant was arrested under s 4(1) of the SOSMA and detained under s 4(5) of the SOSMA. The application for a writ of habeas corpus is against that.

[36] There was no further detention under SOSMA as the applicant was charged under s 130V of the Penal Code and is currently in remand pending trial this month. This means the applicant is no longer under preventive detention of SOSMA. He is being accorded a fair open trial under our criminal justice system. He is given the right to be heard and present his defence.

[117] Therefore, referring to the case of *Tanasilan a/l Nakethiran* above, this court agrees with the High Court decision when it states that the applicant is no longer under preventive detention which attract the 'single overarching transaction', since the earlier decisions of the Federal Court in *Zaidi bin Kanapiah* and *Lei Meng* were referring to that type of detention.

[118] This court is also in agreement with *Tanasilan a/l Nakethiran* when the High Court dismissed the applicant's application stating that 'the effect of this court's finding that the detention under SOSMA is unlawful wherein the writ of habeas corpus lies, may be inoperable'. This court cannot issue a writ of habeas corpus as it has no power to declare an order of a court of competent jurisdiction unlawful, unless by way of an appeal or revision.

[119] This court disagrees with the applicant's argument that this court should not be concerned with how the writ of habeas corpus can be executed should this court decide that the detention of the applicant is unlawful. It is the duty of this court, not only to ensure that the rights of parties be protected, but also that any order of the court should and must be an order that can be executed.

CONCLUSION

[120] Based on the arguments and authorities cited above, this court dismissed the applicant's application for a writ of habeas corpus to be issued.

Application dismissed.

Reported by Dzulqarnain Ab Fatar